Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1123

UNITED STATES OF AMERICA

- against -

RALPH FEOLA

RESPONSE IN OPPOSITION TO PETITION OF UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THIS BRIEF IS RESPECTFULLY SUBMITTED IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE FACTS OF THE CASE ARE SET FORTH IN THE OPINIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT (GOVERNMENT'S APPENDIX A and B).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of a jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

1. It is respectfully submitted to this learned Court that the logical approach to the issue raised in the instant case is that rule of law enunciated in the U.S. v. Crimmins, 123 F.2d 271 (2nd Cir. 1941).

It is respectfully submitted that a conspiracy involves an agreement to perform an offense or criminal act, and accordingly involves a meeting of the minds of the actors. Applying simple logic to the instant case it is submitted that in order for the respondent to be guilty of conspiracy to assault as distinguished from the substantive act of assault he must have, a) agreed to, b) assault, c) a federal narcotics agent. Such an agreement requires specific knowledge of the identity of the victim of the assault.

The fact that specific intent is required for a conviction on a conspiracy count and not on a substantive count is consistent with reason. See U.S. v. Vilhotti, 452 F.2nd 1186 (2nd Cir. 1971) Cert. denied 406 U.S. 947 (1972).

The Government's analogy set forth on pages 11 and 12 of its brief is itself superficially compelling, but it cannot stand the test of logic. For if one can run past a red light on an Indian reservation, where it was planned to disobey the light, but the conspirators were in ignorance of the existence of the Indian reservation, that person could commit and agree to commit the offense without knowing that the light was located on an Indian reservation. Accordingly, said person would be guilty on the substantive count of running past said light under the doctrine set forth in Pinkerton v. U.S., 328 U.S. 640. This is exactly what was decided by the Court of Appeals in the U.S. v. Alsondo, 486 F.2nd 1339 (Government Appendix B). However, that person could not be found guilty of conspiracy to, a) run past a red light, b) located on an Indian reservation, without the requisite knowledge that the light was located on an Indian reservation.

2. The Government in not petitioning for a rehearing with respect to the Court of Appeal's reversal of the conspiracy count did concede and did agree with the rule enunciated in Crimmins. Accordingly, at the rehearing the Government did agree that scienter was necessary to buttress the conviction of respondent on the conspiracy count. See U.S. v. Alsondo, supra where the Court stated as follows:

> "The Government has sought a rehearing of the reversal of the assault convictions of Feola and Rosa. (The Government does not at this time challenge the doctrine of United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941), under which we dismissed the conspiracy counts; that part of the judgment therefore stands)"

It is submitted that the Government has voluntarily acquiesced in, ratified, and recognized the validity of the Crimmins doctrine and is accordingly estopped from changing the theory which it pursued in the Court of Appeals. See U.S. v. Sten, 342 F.2nd 491 (2nd Cir.), and U.S. v. Ballau, 348 F.2nd 467 (2nd Cir.).

As set forth in the Government's petition for Certiorari, at page 3 FN2, the reason that the present petition is sought is that the respondent did not receive a concurrent prison term on the substantive count but instead was sentenced to probation and a fine. This is no reason to grant the instant petition. The fact that he was convicted on the substantive count reduces the importance of the conspiracy count. Consequently the Crimmins doctrine did not pose an obstacle to the instant prosecution for the reason that the substantive offense was consummated.

3. It can be argued that in a prosecution involving interstate transportation of stolen goods and similar type crimes, that the required knowledge of the federal jurisdictional element is illogical and interposes obstacles in the way of prosecution of unconsummated conspiracies. It can also be argued in such conspiracies that knowledge of the federal el-ment can be inferred from the scope of the acts performed and from the duration of the agreement to perform the substantive acts. However, the Crimmins doctrine has been followed in such cases. In a conspiracy for assaulting a federal officer, Crimmins must be followed for the reason that such an offense is more localized and amenable to control by both federal and state law enforcement agencies. Additionally, such an offense is, as in the instant case where alert law enforcement effectively blocked the substantive offense, more amenable to obtaining convictions on the substantive count.

4. Finally, it is requested that in the event certiorari is granted it should be done so with respect to the entire case.

In view of the fact that the conspiracy count was dismissed by the Court of Appeals it is the respondent's position that a fatal chasm was left in the Government's case and that the respondent could not be convicted on the substantive count.

There is no question that respondent could have been convicted on the substantive count without the presence of the conspiracy count under the agency principle enunciated in Pinkerton. However, in such a case it would be incumbent upon the Government to prove that respondent engaged in a criminal

agreement to assault a federal officer by proof of his acts (emphasis supplied) as opposed to heresay declarations made by alleged co-conspirators.

At the trial of the instant case, all of the evidence from which the jury inferred that respondent was a party to an agreement to assault, consisted of heresay declarations of alleged co-conspirators.[1] The heresay was allowed under the exception aforded by the existence of the conspiracy count. It is submitted that this was the basis for the determination that respondent was part of the agreement to assault. When the conspiracy count was dismissed, all of the heresay must be stricken as to respondent, resulting in his acquittal.

---

[1] There was additional proof of a false exculpatory statement made by respondent on the day following the assault and after the alleged conspiracy had ended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE J. BELLANTONI
Attorney for Respondent
190 East Post Road
White Plains, New York 10601

March, 1974.